

## United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

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October 13, 2009

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The Honorable Julius Genachowski  
 Chairman  
 Federal Communications Commission  
 445 12th Street SW  
 Washington, DC 20554

Chairman Genachowski,

Thank you for making your staff available to discuss a number of the concerns I have with the concept of network neutrality, as you recently described it in your speech to the Brookings Institute. A discussion about the future of the Internet as a continuing platform for innovation and economic growth is vitally important, and I look forward to continuing a constructive dialogue with the Commission in the months ahead. I remain concerned that what you have announced as a policy framework poses risks to our efforts to address the lack of broadband connectivity in many rural areas of the country, particularly my home state of Texas. I wanted to formally share my concerns and request that you provide information in response to this letter for the benefit of all members of Congress to assess the need for regulatory activity at this time and its possible implications.

My concerns focus in four areas: necessity of intervention, impact on investment, unintended consequences, and fair application. Whether the Commission currently possesses sufficient authority to enforce the open Internet principles announced several years ago by the Commission is an important threshold issue. If the Commission has legal authority to take enforcement action, as it recently told an appellate court, I question whether it is then necessary to conduct a rulemaking on the subject, particularly one which would simultaneously announce additional principles with uncertain implications for investment and innovation.

The Commission's Internet Policy Statement and the underlying openness principles have been in place for a number of years, and under this framework companies have made billions of dollars of investment in wired and wireless communications networks, spurring innovation and access. These principles are generally understood, if not universally endorsed, by companies across the various industries that comprise the Internet community. I am concerned that a regulatory proceeding at this time creates uncertainty, which in turn, will discourage or at least delay planned investment in critical infrastructure while the Commission formulates new rules. With long planning timelines and lengthy payback periods, providers investing in new infrastructure, particularly small rural communications providers and cooperatives, may be unable to justify investment when they are uncertain about how new rules may impact them. That is a critical issue to understand if we are to make a serious and sustained effort to connect the unserved communities across our nation.

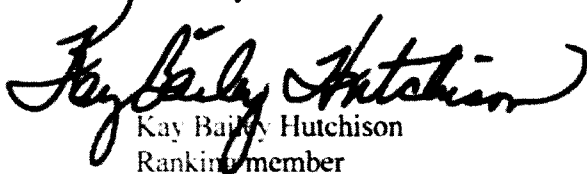
I am also concerned about your statements indicating that all of the principles and rules will be extended to wireless services. I am a strong proponent of technology neutral regulations and parity, but it is my understanding that wireless networks are quite different in their engineering and the manner in which certain applications impact capacity and performance. My fear is that limitations on network

management for wireless companies will inevitably require significant upgrades to existing networks, the cost of which may be borne by consumers in the form of higher prices or reduced coverage. If the Commission is to consider a framework that applies to all technologies used to access the Internet, it must be certain that it can find a balance that guarantees consumers can access the content and applications of their choice, while at the same time offering wireless providers enough flexibility to manage their networks to guarantee quality of service.

Finally, it is important for policy makers to understand whether the Commission views an open Internet as one where rules apply with equal force to all members of the Internet community. Commentary that suggests all of the innovation occurs "at the edge" of the Internet with content, applications, and software is both inaccurate and short sighted. As a member of the Commerce Committee for most of my time in Congress, I have seen tremendous innovation across the Internet landscape, in both the infrastructure and in the applications and content that are delivered to consumers over that infrastructure. We need to understand whether the Commission will apply its principles and rules on an open Internet to everyone in the Internet community or requires additional authority to do so.

I believe that continued discussion of the framework you outlined in your speech is critical in providing certainty to consumers and investors. I look forward to a continuing dialogue and to the answers you provide to the questions that follow. I would appreciate your response, if possible, by October 21, 2009.

Sincerely,

A handwritten signature in black ink, reading "Kay Bailey Hutchison". The signature is fluid and cursive, with the first name "Kay" being particularly prominent and stylized. Below the signature, the name "Kay Bailey Hutchison" and the title "Ranking member" are printed in a standard serif font.

Kay Bailey Hutchison  
Ranking member

- (1) According to news reports, the FCC recently told the Court of Appeals for the District of Columbia that the Commission can enforce the principles contained in the 2005 Internet Policy Statement ("Internet Policy Statement"). Please briefly describe the authority the Commission relied on in its argument to the court and provide a copy of the Commission's brief.
- (2) In your September 21, 2009, speech you stated that you believe there are several clear examples of conduct that deviates from the Internet Policy Statement. For the following passage in your speech, if known, please provide the year, summary of facts, and Commission resolution of each example:

"We have witnessed certain broadband providers unilaterally block access to VoIP applications (phone calls delivered over data networks) and implement technical measures that degrade the performance of peer-to-peer software distributing lawful content. We have even seen at least one service provider deny users access to political content. And as many members of the Internet community and key Congressional leaders have noted, there are compelling reasons to be concerned about the future of openness."

- (3) Please provide the number of investigations or enforcement actions involving alleged violations of the Internet Policy Statement that are currently pending at the Commission.
- (4) Previous Congressional hearings on the subject of "network neutrality" have included testimony from many in the investment community that new regulations will discourage investment. One analyst stated, "investors dislike policy upheavals in Washington that distract them from focusing on market fundamentals . . . we have enough to worry about in considering the rapidly changing competitive and technological environment. In other words, we want regulatory stability and certainty."

Will the Commission, as part of the forthcoming rulemaking, consider the impact on capital formation and investment of any new principles and the codification of principles into the Commission's rules?

- (5) Significant investment in new infrastructure is particularly difficult for small communications providers, including cooperatives that serve rural communities. These providers represent a critical component of any effort to improve broadband access in unserved areas of the country.
  - a. Are there steps that you can take as Chairman, or that you would recommend, to ensure that the record in the forthcoming proceeding includes the views of these small but critical entities?
  - b. Are you concerned that planned investment during the pendency of the Commission's inquiry and future rulemaking may be delayed or cancelled while providers await the outcome of the proceedings?
- (6) Do you believe that service providers should be allowed to offer enhanced or managed services (including priority delivery) for a fee to third parties and content providers if doing so does not impact the quality of service available to other consumers?
- (7) One of the possible principles that you announced involves "transparency" of network management activity where providers may be required to disclose to the consumer and other Internet entities the network management practices they use.

- a. Will the Commission's rulemaking inquiry seek comment from parties about disclosure or limits on particular network management practices such as "deep packet inspection," traffic shaping, and other congestion management activities?
  - b. Will the Commission's inquiry examine any potential privacy implications of network management activity?
  - c. Will the Commission seek to provide protections to guarantee that none of the information it requires providers to disclose with respect to network management practices can be used to identify potential vulnerabilities or points of attack by individuals seeking to mount cyber attacks on our communications networks?
- (8) The Internet community includes a diversity of entities including companies that provide search capabilities to users. Some of these entities have been criticized for arrangements they have made with foreign governments to limit access to particular information that is returned in response to queries. Domestically, some of these entities have also been accused of concealing the practices they use to "rank" search results. Please answer the following:
- a. Do you believe that the Commission has the authority to include all members of the Internet community, including search engine providers, in any neutrality framework the Commission adopts in its rules?
  - b. Separately, do you believe that an "open Internet" should require that all members of the Internet community, including search engine providers, be subject to openness principles?



OFFICE OF  
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

October 21, 2009

The Honorable Kay Bailey Hutchison  
Ranking Member  
Committee on Commerce, Science, and Transportation  
United States Senate  
284 Russell Senate Office Building  
Washington, DC 20510

Dear Senator Hutchison:

Thank you for your letter regarding the draft Commission item to develop rules to preserve an open Internet through an open, participatory public process. I believe we share the same goal -- safeguarding the open Internet as an enduring engine for innovation, investment, economic growth, and the free flow of information. To this important end, you have my pledge to continue working with you and your staff in an ongoing, constructive dialogue with respect to this crucial infrastructure.

Many of the specific questions you posed in your letter will be more fully addressed in the Notice of Proposed Rulemaking (NPRM) that the Commission will consider on Thursday. I will make sure that you and your staff receive a copy of that NPRM as soon as it is public after the Commission's meeting. In addition, I will also instruct the Commission staff to fully brief your staff on the details of the NPRM as soon as can be arranged.

In your letter, you state that your concerns are focused upon the necessity of intervention, impact on investment, unintended consequences, and fair process. Let me address each of these concerns.

With respect to the necessity for intervention, I believe that preserving the open Internet and giving all stakeholders greater predictability about the Commission's policy is furthered by taking action at this time. Through the NPRM, the Commission will be seeking comment on an Internet policy that is a continuation of an effort begun many years earlier. Over the last several years, for example, the Commission has considered the question of how to safeguard the free and open Internet in more than 10 different proceedings, building a record of over 100,000 pages of comments, submitted by approximately 40,000 companies, organizations, and members of the public. Moreover, in 2005, a unanimous Commission issued the *Internet Policy Statement*, affirming the agency's "duty to preserve and promote the vibrant and open character of the Internet." In the intervening years, the Commission has enforced these principles on a bipartisan basis and imposed openness requirements several major mergers. Two years ago, the Commission issued a broad-ranging *Notice of Inquiry* that sought comment on many of the issues addressed in today's decision, including the topics of non-discrimination and transparency.

Notwithstanding these actions, we have continued to see problems in the marketplace, though very likely not as many as we would have seen absent Commission action. And, no less important, the openness principles that the Commission adopted in 2005 are under attack precisely because they did not emerge from the kind of public, participatory rule-making the NPRM would launch. I firmly believe that our nation's innovation and investment goals are advanced if the marketplace is clear about Commission policy with respect to the Internet and I believe removing ambiguity – legal or otherwise - will allow businesses small and large to implement business plans with greater confidence.

With respect to the impact on investment, I fully concur with you that the "Commission's Internet Policy Statement and the underlying openness principles have been in place for a number of years and under this framework companies have made billions of dollars of investment in wired and wireless communications networks, spurring innovation and access." The free and open Internet has been an unparalleled platform for economic growth and investment. Many well-known Internet companies began with little more than a bright idea and a strong work ethic. In addition, there are some 600,000 Americans who rely upon the free and open Internet to run small businesses through Ebay, for example. Moreover, Internet service providers have made many billions of dollars of investment in networks and infrastructure, responding in part to the strong demand from consumers for higher speed service to access the lawful content, applications, and services of their choice on the Internet. I fully acknowledge the importance of infrastructure investments and it is imperative that we have ongoing investment. I welcome input from all stakeholders on how best to maximize investment across the broadband ecosystem, including how to promote network investment in rural areas. The NPRM also seeks input on how a category of "specialized" or "managed" services can be encompassed as part of a larger broadband policy in a manner that welcomes innovation from ISPs and experimentation in business models.

With respect to unintended consequences, we are keenly aware of this risk and it is why I have emphasized that open Internet rules should provide flexible, high level guidance rather than heavy-handed prescription. One way I am seeking to avoid unintended consequences is to invite robust public input over a multi-month process on the array of issues involved. In addition, as requested by many stakeholders and advocates of reform of FCC processes, I am asking my fellow Commissioners to join me in putting out draft, proposed rules for all participants to see, comment on, and help the agency refine from the very start of the process.

With respect to fair process, in addition to including draft, proposed rules, we will seek broad input both through traditional sources, such as public comments, but also, as with our efforts to develop a national broadband strategy, through less traditional means, such as through public workshops. The rulemaking process will be methodical, fair, and transparent for all interests

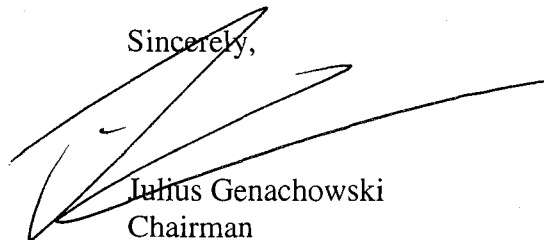
In short, the goal of the NPRM is to preserve the free and open Internet and its extraordinary benefits, including the ability of entrepreneurs, small businesses as well as network operators to innovate without seeking permission from any central authority, public or private. The NPRM is

intended to launch a process by which all viewpoints and concerns, including questions about rural investment and wireless services, will be reviewed and examined.

Let me also add that I believe that our policy must encompass the ability of broadband Internet access providers to reasonably manage their networks. Moreover, although I believe that the principles should apply to all modes of accessing the Internet, the NPRM will seek input on how, when, and to what extent the principles should apply to different access platforms – such as mobile wireless services. There are meaningful differences between wireline and current wireless networks, and our policy should reflect such distinctions. Finally, our overall policy must also welcome ongoing innovation and I believe that specialized or managed services can bring supplemental innovation and applications to consumers without endangering the free and open Internet we seek to preserve for all users.

The goal of the proposals I have outlined is to preserve the free and open Internet, to provide greater predictability for the marketplace, and to foster continued innovation and investment. Any final rules will be the result of a fair and open process. Again, I look forward to a constructive dialogue with you on these issues. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Julius Genachowski', is written over the printed name and title.

Julius Genachowski  
Chairman